



U.S. Department of Justice

United States Attorney
District of Montana

MARK SMITH
ASSISTANT U.S. ATTORNEY

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Billings, Montana 59103

January 20, 2010

SAC Lori Hanson
USEPA REGION 8
1595 Wynkoop St.
Mail Code: 8CID
Denver, CO 80202-1129

**RE: ASARCO East Helena RCRA Hazardous Waste Storage Violations
Involving Zinc Oxide Dust and Sodium Metal
Our file no. 2007R0208**

Dear Lori:

As we have discussed, the U.S. Attorney's Office has formally declined the Asarco East Helena case for prosecution. The RCRA hazardous waste storage violations alleged to have occurred at the East Helena facility involved zinc oxide dust associated with the zinc fuming plant, and sodium metal stored in a stationary railcar located inside a sodium handling building. Extensive discussions with DOJ analysts and EPA specialists indicate that, for various reasons, it will be problematic to establish the elements of a crime beyond a reasonable doubt. As you know, the RCRA and its implementing regulations are quite complex. In this case, that complexity enhanced the difficulty of proving, based on the totality of the circumstances, that Asarco knew that the materials in question were wastes subject to RCRA.

Moreover, as you know, Asarco is currently paying more than a hundred million dollars to rectify its environmental liabilities in Montana through a final bankruptcy reorganization plan. Asarco has already paid additional funds in consideration of the Montana DEQ's waiver of civil claims for these same two RCRA storage violations. Asarco will also pay additional significant funds to DOJ via separate civil settlement agreement, for these same two RCRA storage violations. In fact, Asarco and this office negotiated the civil penalty, with EPA's advice and consent, as a more appropriate resolution of the referenced RCRA storage violations than a criminal prosecution. Criminal charges are incompatible with this resolution and, in light of the foregoing, are not in the interests of justice. I am declining prosecution and closing my file.

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EXHIBIT 1

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Thank you for your assistance in this matter.

WILLIAM W. MERCER
United States Attorney



MARK SMITH
Assistant U.S. Attorney

cc: Kris McLean
Criminal Chief